

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Public Safety Communications in the 800 MHz Band)	WT Docket 02-55
)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels)	
)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems)	ET Docket No. 00-258
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service)	ET Docket No. 95-18
)	

**PETITION FOR RECONSIDERATION
OF SPRINT NEXTEL CORPORATION**

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Summary

The Commission should reconsider its decision in the Memorandum Opinion & Order (“*MO&O*”) to expand the relocation rights of non-Sprint Nextel, non-SouthernLINC Enhanced Specialized Mobile Radio (ESMR) and non-ESMR licensees. As the Commission acknowledged in the *MO&O*, expanding the rights of these licensees to retune to the ESMR segment of the reconfigured band will reduce Sprint Nextel’s post-reconfiguration spectrum holdings. The *MO&O* provides no public interest justification for this result.

Sprint Nextel has committed to contribute billions of dollars in financial and spectrum resources to implement the Commission’s 800 MHz reconfiguration plan. Sprint Nextel’s commitment is based on the Commission’s careful “value for value” analysis in the Report and Order and Supplemental Order in this proceeding. This analysis, based on an exhaustive record, sought to ensure that the value of the replacement spectrum Sprint Nextel receives matches the value of its spectral and financial contributions. The Commission’s objective was not just to prevent Sprint Nextel from receiving a windfall, but also to make sure Sprint Nextel was treated equitably.

The *MO&O* ignores the “value for value” principle that underlies the Commission’s prior orders. The *MO&O* now enables low-density cellular systems and certain non-ESMR site-based licenses to retune to the ESMR band. It also grants requests filed by AIRPEAK and Airtel that may increase their ESMR band spectrum holdings. These decisions will reduce the value of the replacement spectrum Sprint

Nextel will receive post-reconfiguration, thus undermining the Commission's prior stated objective of ensuring Nextel is treated equitably.

The *MO&O* is both unfair to Sprint Nextel and arbitrary in failing to explain why it departs from the "value for value" analysis adopted in the *R&O* and *Supplemental Order*. Moreover, expanding ESMR band retuning rights is not necessary to achieve any of the Commission's public interest objectives in this proceeding – remedying 800 MHz public safety interference, ensuring that incumbents receive comparable facilities, and providing additional spectrum for public safety communications. The Commission should reinstate the ESMR relocation criteria established in the Report and Order and the Supplemental Order.

The Commission should also confirm that the steps it has used to address the shortage of ESMR band channels in SouthernLINC markets apply to all markets. In the Report and Order, the Commission expanded the ESMR band in SouthernLINC markets to help ensure that both SouthernLINC and Sprint Nextel can replicate their existing channel capacity. The Commission also stated that to the extent the two licensees did not reach agreement on allocating channels in these markets, the available channels should be distributed on a *pro rata* basis. As the Commission's Report and Order in this proceeding made clear, these remedies to potential channel shortages are not limited to SouthernLINC markets. They should apply to all markets to promote an equitable reconfiguration process in the event there is insufficient spectrum to accommodate all licensees eligible to retune to the ESMR band – a direct outcome of the *MO&O*'s ill-considered and unjustified expansion of non-Sprint Nextel, non-SouthernLINC ESMR and non-ESMR relocation rights.

Sprint Nextel urges the Commission to clarify that Sprint Nextel will have discretion to select the twenty NPSPAC regions in which it will complete the Stage I (formerly Phase I) retuning process (channels 1 – 120) by the 18-month reconfiguration benchmark. This discretion serves the public interest in ensuring timely 800 MHz retuning progress while maintaining the integrity of the incumbent-by-incumbent retuning negotiation process. It also ensures that the now well-recognized retuning negotiations imbalance inherent in the Transition Administrator’s heavily front-loaded NPSPAC regional prioritization plan does not compromise Sprint Nextel’s compliance with the Commission’s 18-month interim reconfiguration progress benchmark. Wave 1 of the reconfiguration process includes a disproportionate number of the most complex and congested markets in the country. Tying Sprint Nextel’s compliance with the interim benchmark to such a front-loaded schedule would place unreasonable burdens on Sprint Nextel and undermine the flexible approach the Commission took in adopting its band reconfiguration framework.

In addition, the Commission should clarify that the freeze on 800 MHz applications does not apply to modification applications that help effectuate frequency relocation agreements. The Commission should also reconsider its recommendation in the *MO&O* that the TA include the reconfiguration of the 800 MHz band in American Samoa, Guam, the Northern Mariana Islands, and the Gulf of Mexico in Wave 4. Reconfiguration may be both unnecessary and infeasible in these areas.

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**PETITION FOR RECONSIDERATION
OF SPRINT NEXTEL CORPORATION**

Sprint Nextel Corporation (Sprint) hereby petitions the Commission to reconsider certain aspects of the Memorandum Opinion and Order in the above-captioned proceeding.¹ The Report and Order and Supplemental Order in this proceeding struck a

¹ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Memorandum Opinion and Order, 20 FCC Rcd 16015 (2005) (MO&O).

careful balance in seeking to promote an efficient, equitable reconfiguration of the 800 MHz band.² The *MO&O* reaffirms key aspects of Commission's prior orders, including the Commission's legal authority to assign Sprint Nextel replacement spectrum in the 1.9 GHz band in return for its substantial contributions to the band reconfiguration plan. Sprint Nextel fully supports the Commission's decision on these issues and remains fully committed to the reconfiguration process.

Sprint Nextel respectfully submits, however, that certain other aspects of the *MO&O* – particularly the Commission's decision to expand the relocation rights of non-Sprint Nextel, non-SouthernLINC Enhanced Specialized Mobile Radio (ESMR) and non-ESMR licensees – upset the careful balance struck in the Commission's previous orders. Sprint Nextel urges the Commission to reconsider these aspects of the *MO&O* and to clarify a number of other matters to ensure the Commission's band reconfiguration plan achieves its public interest objectives.

I. THE *MO&O*'s EXPANSION OF ESMR BAND RELOCATION RIGHTS IS UNNECESSARY AND DISREGARDS THE COMMISSION'S "VALUE FOR VALUE" ANALYSIS IN THE *R&O*

A. Background

1. *Broadened Definition of Cellular Systems Eligible For Retuning to the ESMR Segment*

The Commission emphasized in the *R&O* that remedying 800 MHz public safety interference required retuning *high-density* cellular licensees to the new ESMR portion of the reconfigured band, but that *low-density* cellular systems do not need to be retuned

² *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) ("*R&O*"); Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120 (2004) ("*Supplemental Order*").

because they do not pose a significant interference risk.³ At the same time, the Commission held that only high-density systems can be retuned to the ESMR channel block to prevent recreating the mix of high-density low-site and low-density high-site systems that gave rise to the 800 MHz interference problem in the first place.⁴ Consistent with these Commission findings, the Transition Administrator (TA) required licensees seeking to relocate to the ESMR band to certify that they satisfied the definition of high-density cellular systems set forth in the Commission's rules.

The *MO&O*, however, broadens the definition of cellular systems eligible to retune to the ESMR band. Under the new criteria, both high and low-density cellular systems may now retune to this band, even though low-density architectures pose no significant interference threat to public safety systems in the non-ESMR band yet can recreate the interference problem in the new ESMR channel block.⁵

2. *Treatment of AIRPEAK Licenses*

The *MO&O* granted a number of requests by AIRPEAK to expand its rights to relocate its site-based licenses to the ESMR band. First, the *MO&O* eliminates the requirement that non-Sprint Nextel, non-SouthernLINC ESMR licensees may only retune a site-specific license to the ESMR band if the site-specific license has, as of the effective date of the *R&O* (November 22, 2004), a 40 dBuV/m coverage contour overlap with another cell site that is integral to the ESMR system. In place of this easily understood and objectively-ascertainable contour overlap requirement, the Commission is now allowing "licensees to present facts to the TA that may support a finding that non-

³ *R&O* ¶ 172.

⁴ *Id.* ¶¶ 161-163, 172.

⁵ *MO&O* ¶ 8.

overlapping stations are, in fact, an integral part of the licensee's EA-based system.”⁶ Second, the *MO&O* directs the TA to consider site-based facilities AIRPEAK acquired through the spectrum lease process as potentially eligible for retuning to the ESMR segment.⁷ Third, the *MO&O* directs the TA to consider allowing AIRPEAK to retune to the ESMR segment certain site-based stations that it acquired from other licensees that had *not* been integrated into its ESMR systems by November 22, 2004 – the date specified in the *R&O*.⁸ Fourth, the Commission permitted AIRPEAK (and Airtel) to apply for a waiver to convert a site-based license into an EA-wide license in the ESMR block provided they demonstrate that the 40 dBuV/m contours of the site-based license cover at least 50% of the population within the EA.⁹

3. *Expanded Non-ESMR Rights to Retune Site-Based Stations*

Under the *Supplemental Order*, non-ESMR licensees had the option of retuning their EA licenses, but not their site-based licenses, to the ESMR segment. At the request of a group of non-ESMR licensees, however, and with no explanation of how this action would reduce interference or otherwise benefit public safety communications systems, the Commission in the *MO&O* extended this option to site-based licenses as well. Non-

⁶ *MO&O* ¶ 15.

⁷ The Commission stated that AIRPEAK must (1) demonstrate to the TA that the leased station it wishes to relocate was an integral part of its EA-based system as of November 22, 2004, and (2) provide the consent of the licensee of the leased station. *MO&O* ¶ 16.

⁸ *R&O* ¶ 163. The Commission stated in the *MO&O* that AIRPEAK must demonstrate to the TA that (1) the 40 dBuV/m contours of the acquired stations either overlap the EA served by its system or overlap the 40 dBuV/m contours of stations that link back to the EA, and (2) the assignment of the subject license had been consummated by November 22, 2004. *MO&O* ¶ 22.

⁹ *MO&O* ¶ 18. The *MO&O* rejects AIRPEAK's proposal that the 22 dBuV/m contour be used in this calculation.

ESMR EA licenses may now elect to retune site-based stations to the ESMR block if they were part of the licensee's integrated communications system on November 22, 2004.¹⁰

B. The MO&O Will Reduce Sprint Nextel's Post-Reconfiguration Spectrum and Ignores the "Value for Value" Principle Established in the R&O

In the *R&O*, the Commission recognized that by "facilitating band reconfiguration, giving up spectrum rights and bearing the financial burden of the relocation process for all affected incumbents, . . . Nextel has provided the quickest, most comprehensive and most cost-effective means of solving the 800 MHz public safety interference problem."¹¹ The Commission found that its reconfiguration plan could not be "legally or equitably imposed without a compensatory assignment of spectrum rights to Nextel."¹² The Commission accordingly modified Sprint Nextel's licenses to provide it compensatory spectrum in the former public safety NPSPAC channel block at 821-824/866-869 MHz and the PCS G Block at 1910-1915/1990-1995 MHz.

The Commission assigned Sprint Nextel compensatory spectrum on a "'value for value' basis" to "ensure that Nextel is treated equitably but does not realize any windfall gain."¹³ Under this approach, the value of Sprint Nextel's financial and spectral contributions to the reconfiguration plan will be credited against the Commission's \$4.86

¹⁰ The Commission stated that a non-ESMR licensee's site-based station will be considered integrated if: (1) it is located within the geographical boundaries of the relevant EA, *or* (2) it is outside the EA, but has a 40 dBuV/m contour that intersects the EA boundary, *or* (3) it is outside the EA, but has a 40 dBuV/m contour that, in combination with other of the licensee's stations with mutually intersecting 40 dBuV/m contours, forms a contiguous footprint with the EA boundaries, *or* (4) the licensee presents facts to TA to support a finding that non-overlapping stations are an integral part of licensee's EA-based system. *MO&O* ¶ 25.

¹¹ *R&O* ¶ 211.

¹² *Id.* ¶ 215.

¹³ *Id.* ¶ 212.

billion valuation of the 1.9 GHz spectrum, with any difference to be paid by Sprint Nextel to the U.S. Treasury as part of the “true-up” process when band reconfiguration is completed. These offsetting credits included “the net value of the spectrum rights that Nextel is relinquishing to public safety, [Critical Infrastructure Industry], and other 800 MHz licensees.”¹⁴ The *R&O*, as modified by the *Supplemental Order*, placed a value of \$2.059 billion on these net 800 MHz spectrum rights based on a comprehensive valuation analysis, including consideration of the value of the spectrum rights awarded to Nextel in the new ESMR channel block.

Based on this value for value analysis, Sprint Nextel accepted the license modifications and multi-billion dollar reconfiguration obligations set forth in the *R&O* and *Supplemental Order*. Sprint Nextel’s acceptance took into account that it would be required to share some ESMR band spectrum with other ESMR and EA licensees in certain markets, but only to the extent provided under the ESMR band relocation criteria set forth in the Commission’s initial two orders in this proceeding.

The *MO&O* alters these relocation criteria, and in doing so disregards the “value for value” principle established in the Commission’s prior orders. The *MO&O* acknowledges that expanding ESMR band relocation rights will “potentially reduc[e] the amount of ESMR band spectrum available to Nextel.”¹⁵ In its submissions in this docket prior to the adoption of the *MO&O*, Sprint Nextel confirmed that it would in fact suffer a loss of spectrum in the ESMR channels if the Commission granted petitions filed by AIRPEAK and other SMR licensees seeking more spectrum in the ESMR band. Sprint Nextel also pointed out that such a result would be inconsistent with the careful valuation

¹⁴ *Id.*

¹⁵ *MO&O* ¶ 27.

of Sprint Nextel's post-reconfiguration spectrum rights in the *R&O* and *Supplemental Order*. As Sprint Nextel stated in one of its filings, "the FCC's 800 MHz band reconfiguration decision was the result of a value-for-value equation that provides Sprint Nextel with sufficient replacement spectrum in return for its substantial contributions to this band reconfiguration process."¹⁶

The *MO&O* does not address the concerns raised by Sprint Nextel, nor does it even mention the careful valuation the Commission conducted in its previous orders to ensure that Sprint Nextel is treated equitably. Indeed, the Commission's entire discussion of ESMR relocation rights makes only a single passing cite to one of Sprint Nextel's filings, without any response to the points raised therein. An agency decision will be deemed arbitrary and capricious if it fails to explain a departure from a prior agency decision.¹⁷ This is the case here. The Commission has provided no public interest justification for ignoring the "value for value" principle adopted in its prior orders. It has

¹⁶ Letter from Regina M. Keeney, Counsel to Sprint Nextel, to Marlene H. Dortch, FCC Secretary, at 1 (Oct. 4, 2005). *See also* Opposition and Comments of Nextel Communications, Inc. Regarding Petitions for Reconsideration at 13, 15 (April 21, 2005) ("Sprint Nextel Opposition") (Granting the AIRPEAK petition "would only further reduce Nextel's post-reconfiguration holdings in [the ESMR segment] and interrupt its network deployment. This would undermine the Commission's efforts to ensure that Nextel receives sufficient replacement spectrum as compensation for its very substantial contributions to the 800 MHz band reconfiguration decision."); Opposition of Nextel Communications, Inc. to AIRPEAK Request for Waiver at 11-12 (March 28, 2005) ("Sprint Nextel Opposition to AIRPEAK Waiver Request") (urging the Commission not to upset the careful balancing it struck in its valuation analysis); Opposition of Nextel to Airtel Request for Waiver at 5-6 (April 4, 2005) ("Sprint Nextel Opposition to Airtel Waiver Request") (same). (All comments and *ex parte* submissions cited herein were filed in WT Docket No. 02-55.)

¹⁷ *Orion Communications Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1997) ("Although the Commission is not necessarily bound by its prior decisions, particularly in cases where it must weigh the public interest and the equities in an individualized fashion, the Commission is bound to provide an explanation when it departs from a clear precedent.").

reduced Sprint Nextel's spectrum rights, even though those rights were a critical element in the Commission's previous efforts to ensure that the value of Sprint Nextel's post-reconfiguration spectrum holdings matched its substantial contributions to 800 MHz band reconfiguration. This is both arbitrary and unfair to Sprint Nextel. The Commission should reinstate the ESMR band relocation criteria set forth in its prior orders.

C. Expanding ESMR Band Relocation Rights Is Not Necessary to Achieve the Commission's Public Interest Objectives

Under the Administrative Procedure Act, a reviewing court is required to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁸ In applying this standard, the Supreme Court has stated that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"¹⁹ The D.C. Circuit has echoed this statement:

Although the arbitrary and capricious standard of review is deferential, the court will "intervene to ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action. Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action."²⁰

The *MO&O* fails to provide a reasoned explanation for the expansion of ESMR band relocation rights. The order, in fact, provides little or no reason for this expansion. For example, in broadening the definition of cellular systems eligible to retune to the

¹⁸ 5 U.S.C. § 706(2)(A).

¹⁹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁰ *Bellsouth Corp. v. FCC*, 162 F.3d 1215, 1221-22 (D.C. Cir. 1999) (quoting *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)).

ESMR band, the Commission briefly summarized the requests made by parties to broaden the definition, stated it agreed with these requests, and set forth the new definition. Nowhere in the order does the Commission explain the public interest basis for its conclusion.

Importantly, the expansion of ESMR relocation rights is not necessary nor even reasonably related to achieving the Commission's goals in this proceeding: remedying public safety interference in the 800 MHz band, providing additional spectrum for public safety communications, and providing incumbent licensees with comparable facilities in the event they need to be retuned.²¹ Under the *MO&O*, low-density cellular systems and certain types of site-based stations licensed to non-ESMR EA licensees now have the option to retune to the ESMR band. This new option has nothing to do with remedying the 800 MHz interference problem since, as the Commission's orders make clear, this type of system does not pose a significant interference threat and retains the option of remaining on channels that will be operating directly adjacent to public safety licensees. The Commission's decision to expand the relocation rights of AIRPEAK and Airtel also is unrelated to remedying public safety interference; as Sprint Nextel explained in its previous filings, these licensees operate the type of low-density facilities that are compatible with public safety operations.²² At a minimum, the expanded ESMR retuning rights granted AIRPEAK and Airtel go well beyond their demonstrated low-site, high-density licensing rights while diminishing the "value for value" spectrum exchange that

²¹ *R&O* ¶¶ 2, 4.

²² Sprint Nextel Opposition at 13-15; Sprint Nextel Opposition to AIRPEAK Waiver Request at 8-11; Sprint Nextel Opposition to Airtel Waiver Request at 4-5.

Sprint Nextel expressly relied upon in deciding to accept the Commission's proposed modification of Sprint Nextel's 800 MHz licenses.

The expansion of ESMR band relocation rights is not necessary to provide incumbent licensees with comparable facilities. To the extent low-density ESMR systems and site-based stations licensed to non-ESMR EA licensees need to be retuned at all, they can receive replacement channels in the interleaved spectrum segment at 809-815/854-860 MHz.²³ These channels will provide these licensees with the same geographic coverage and same functionality as their existing channels.²⁴ The *MO&O* gives these licensees a windfall by increasing their spectrum rights in the reconfigured band.²⁵ There is no public interest basis for such an outcome.

D. Expanding ESMR Band Relocation Rights Will Create Delay and Uncertainty

The *MO&O* requires the TA to open a new window to permit eligible licensees to elect to retune to the ESMR band or modify their previous elections pursuant to the modified criteria adopted in the order.²⁶ A number of these criteria will also require

²³ These licensees also may have the option of being retuned to the Guard Band and Expansion Band as provided under the *R&O* and *Supplemental Order*.

²⁴ The *MO&O* (¶ 25) states that allowing non-ESMR EA licensees "to relocate their associated site-based licenses in conjunction with their EA licenses if they elect to move to the ESMR band . . . will . . . achieve more effectively the goal of placing these licensees in a position comparable to that they currently occupy." The *MO&O*, however, does not explain the basis for this statement. Consolidating both EA and site-specific licenses in the same channel block is not necessary for non-ESMR licensees to provide the same service they were providing as of the effective date of the *R&O*. Their customer radios can tune to frequencies in both the ESMR and non-ESMR portions of the reconfigured band. Indeed, many 800 MHz radios already have this capability.

²⁵ See Sprint Nextel Opposition at 10-15; Sprint Nextel Opposition to AIRPEAK Waiver Request at 8-12; Sprint Nextel Opposition to Airtel Waiver Request at 4-5.

²⁶ *MO&O* ¶ 9. The TA has already announced the opening of this new twenty-day window, running from January 18 through February 6, 2006. "800 MHz Transition

licensees to submit factual showings or waiver requests. The TA will need additional time to assess these showings and requests. These assessments are likely to be based on fact intensive, imprecise criteria instead of the precise, objectively-demonstrable service area contour analysis the Commission previously required. For example, an incumbent may now present “facts” showing that a non-overlapping site-based station is nonetheless “integrated” with its EA system, and is thereby eligible for retuning to the ESMR channel block. The *MO&O* provides little guidance, however, on what integration means other than providing one illustrative example.

The new election window and vague criteria adopted in the *MO&O* will create uncertainty, require additional decisions and process by the TA, and thereby delay the reconfiguration process. As Sprint Nextel explained in a previous filing, the modifications to the ESMR band election criteria made by the *MO&O* affect every ongoing negotiation Sprint Nextel has with EA and ESMR licensees and create a new set of transactions that must be negotiated.²⁷ The modifications may also affect signed frequency relocation agreements (FRAs) with non-EA, non-ESMR licensees.²⁸ All of this will make band reconfiguration more costly. Worse, it has already delayed completion of the Stage I (Phase I), Wave I retuning negotiations as the affected licensees have awaited the opening of the new ESMR block election window. Delays in making

Administrator to Open Filing Window for EA Elections,” Press Release (Jan. 11, 2006), available at: <http://www.800ta.org/content/news/2006/01_11_06.asp>.

²⁷ Letter from Lawrence R. Krevor, Sprint Nextel, to Cathy Seidel, FCC, at 6-7 (Dec. 1, 2005), attached to Letter from Lawrence R. Krevor, Sprint Nextel, to Marlene H. Dortch, FCC Secretary (Dec. 12, 2005) (“*Sprint Nextel December 1 Ex Parte Letter*”).

²⁸ *Id.* at 7 (“For example, one licensee with a signed FRA could now be unable to voluntarily retune its system to the Guard Band because the Commission has expanded the rights of EA and ESMR licensees to retune their facilities in a manner that potentially limits the availability of Guard Band channels for non-EA and non-ESMR retunees.”).

these elections, negotiating retuning agreements and resolving contested “integration” and similar issues of fact are already making a complicated process more difficult, costly and time consuming.

II. THE COMMISSION SHOULD CONFIRM THAT IT WILL EXPAND THE ESMR BAND AND REQUIRE A *PRO RATA* DISTRIBUTION OF CHANNELS IN THE EVENT OF A SPECTRUM SHORTFALL

The *R&O* adopted two remedies in the event there is insufficient spectrum in the ESMR segment to accommodate all eligible licensees in a market: (1) expanding the ESMR segment, and, in the event a channel shortfall remained, (2) distributing the available channels on a *pro rata* basis among licensees unless they reached an alternative agreement. In the *R&O*, the Commission applied the first remedy to SouthernLINC markets, expanding the ESMR band in those markets to 813.5-824/858.5-869 MHz.²⁹ The Commission also stated that it would invoke the second remedy if the parties failed to reach an agreement on the allocation of channels in the expanded band.³⁰

Nothing in the *R&O* limits these remedies to SouthernLINC markets. Indeed, the *R&O* clearly indicated that there may be other markets in which there is insufficient ESMR segment spectrum, raising the possibility that the segment should be expanded in those markets as well.³¹ The *R&O* also stated that “[p]arties are hereby put on notice that disputed matters concerning ESMR channels *in any area of the country*, including

²⁹ *R&O* ¶ 166. At SouthernLINC’s request, the *MO&O* (¶ 48) also reduced the Expansion Band by one-half megahertz within a seventy mile radius of Atlanta.

³⁰ *R&O* ¶ 168.

³¹ *R&O* ¶ 164 (“We are aware that, in some markets, there may be insufficient spectrum in the 816-824 MHz/861-869 band segment to accommodate both incumbent ESMR licensees already operating there and new ESMR entrants migrating from the lower channels.”).

[SouthernLINC markets,] may be resolved by the Commission making a *pro rata* distribution of ESMR channels.”³²

Notwithstanding these clear statements, some parties have suggested to Sprint Nextel that the expansion of the ESMR segment and the *pro rata* distribution of channels are limited to addressing the channel shortfall in the SouthernLINC markets. The Commission should confirm, consistent with the *R&O*, that these measures are not so limited, but can be used in any situation where there is a shortage of ESMR channels to accommodate both Sprint Nextel and other licensees. The Commission should reaffirm the underlying principle that all affected licensees should be able to replicate their existing channel capacity, and that where this is not possible a *pro rata* apportionment is appropriate in any market where there are insufficient ESMR channels.

In such situations the Commission should also expand the ESMR band at the request of the affected parties. Sprint Nextel expects that very few markets will be subject to these requests, and the requests will involve a smaller expansion of the ESMR band than in the SouthernLINC markets. Where expanding the ESMR band is not feasible, however, or does not provide sufficient spectrum to accommodate all parties, the available ESMR channels should be distributed among the eligible licensees on a *pro rata* basis. There is no public interest basis for requiring Sprint Nextel to bear the full burden of a shortage of ESMR band channels. On the contrary, placing the full burden on Sprint Nextel contravenes the “value for value” equation that is at the heart of the Commission’s 800 MHz reconfiguration decision.

³² *R&O* ¶ 168 (emphasis added).

The *MO&O*, by expanding ESMR band relocation rights, has increased the risk of a shortfall in ESMR channels in certain markets. Accordingly, the Commission must confirm that the remedies described above apply to all markets and licensees eligible to retune to the ESMR band. Sprint Nextel respectfully submits that in the event the Commission affirms its decision to expand ESMR band relocation rights, it will be seriously jeopardizing the legal basis of its 800 MHz decision unless it couples that affirmation with assuring the availability of ESMR band expansion and/or *pro rata* ESMR channel block sharing in the event there are insufficient ESMR block channels to accommodate all legitimate incumbent ESMR block retunees.

III. THE COMMISSION SHOULD CLARIFY THAT SPRINT NEXTEL HAS DISCRETION TO SELECT THE TWENTY REGIONS SUBJECT TO THE INTERIM BENCHMARK

The Commission has established an interim benchmark for 800 MHz reconfiguration, requiring Sprint Nextel to have retuned all non-Sprint Nextel, non-SouthernLINC incumbents from channels 1-120 in twenty NPSPAC regions within 18 months of the start of band reconfiguration.³³ The Commission adopted this 18-month milestone to provide a “meaningful midpoint benchmark” and to help ensure “timely completion of band reconfiguration.”³⁴ At the same time, the Commission emphasized the importance of flexibility in its reconfiguration framework given “the complexity of the rebanding process, including the hiring of personnel, the complexity of the information necessary to develop schedules and the attendant need to coordinate with

³³ *Supplemental Order* ¶ 53. Sprint Nextel must also have initiated retuning negotiations with all NSPAC licensees within these 20 regions by this 18-month benchmark.

³⁴ *Id.*

equipment manufacturers.”³⁵ The Commission reasoned that “some degree of flexibility will better serve the parties” and that the “overriding requirement of our framework is the good faith requirement.”³⁶

The Commission, in fact, clarified the 18-month benchmark in the *Supplemental Order* to provide greater flexibility in light of the complexities of band reconfiguration. The *Supplemental Order* clarified that only non-Nextel, non-SouthernLINC licensees need to be retuned from channels 1-120 by the 18-month deadline.³⁷ In clarifying the benchmark, however, the *Supplemental Order* inadvertently made another aspect of the interim milestone less flexible. In particular, the *Supplemental Order* states that the twenty NPSPAC regions that are subject to the 18-month benchmark are “the first twenty NPSPAC Regions the Transition Administrator has scheduled for band reconfiguration.”³⁸ Sprint Nextel respectfully submits that rigidly linking the 18-month benchmark to the TA’s subsequently-developed regional prioritization plan is inconsistent with the flexible approach the Commission took in its initial adoption and subsequent clarification of the benchmark. As explained below, the Commission should clarify that Sprint Nextel has discretion to identify which regions are subject to the benchmark.

The *R&O* gave this discretion to Sprint Nextel, requiring it to meet the interim benchmark “in twenty NPSPAC Regions” but not tying these regions in any way to the

³⁵ *Id.* ¶ 55.

³⁶ *R&O* ¶ 202. The Commission’s emphasis on flexibility prompted it to reject a Consensus Party proposal that would have established more rigid relocation procedures. *Id.*

³⁷ *Supplemental Order* ¶ 53.

³⁸ *Id.*

TA's reconfiguration schedule.³⁹ No party objected to this flexible approach, nor did the *Supplemental Order* provide any explanation for departing from this approach and linking the interim benchmark with the TA's reconfiguration schedule. This linkage introduces the type of "rigid rules" the Commission sought to avoid in adopting a flexible reconfiguration framework.⁴⁰

The TA's schedule does not account for the various factors that could make compliance impossible in a given region, such as incumbent hold-outs or unforeseen natural disasters. As Sprint Nextel explained in its December 1 filing, there are a number of outside factors that affect Sprint Nextel's ability to control unilaterally band reconfiguration and perform this unprecedented undertaking within the time periods established under the TA's schedule.⁴¹ As Sprint Nextel explained, the TA's schedule is heavily front loaded.⁴² Wave 1 is the largest and most complex of all the waves of the reconfiguration process. A disproportionate number of incumbents in Wave 1 have some of the most complex systems and/or operate in the most populous and spectrum-congested areas in the country. Sprint Nextel urged the TA to distribute these complex markets more evenly throughout all four reconfiguration waves and allow a "ramp up" period so that incumbents and vendors can gain experience in retuning planning and the negotiation process before taking on a large number of the most challenging markets. The TA did not adopt this recommendation, although real world experience over the past

³⁹ R&O ¶ 346 (as renumbered by Second Erratum, 19 FCC Rcd 19651 (2004)).

⁴⁰ R&O ¶ 201.

⁴¹ *Sprint Nextel December 1 Ex Parte Letter*. The Commission expressly recognized that Sprint Nextel cannot unilaterally dictate or control 800 MHz reconfiguration in its proviso that Sprint Nextel's compliance with various benchmarks may be excused if prevented by reasons "outside [its] control." See R&O ¶ 332.

⁴² *Sprint Nextel December 1 Ex Parte Letter* 4-5.

six months has borne out concerns Sprint Nextel raised regarding the large number of complex system retunings and congested markets in Wave 1. Public safety parties and others have echoed these concerns in commenting on the front-loaded nature of the TA's reconfiguration schedule.⁴³

A flexible approach that gives Sprint Nextel the discretion to choose the twenty regions subject to the interim benchmark would enable Sprint Nextel to respond in a reasonable, efficient manner to the unpredictable issues that are likely to arise in the complex markets disproportionately represented in Wave 1. At the same time, this flexible approach will still provide a benchmark that demonstrates substantial progress toward completing reconfiguration according to the FCC's mandated schedule. In addition, from a practical perspective, there is no "fit" between the interim benchmark and the TA's reconfiguration timetable. There are fifteen regions in Wave 1 of the TA's reconfiguration schedule and twenty-two regions in Wave 2;⁴⁴ accordingly, there is no way to determine the first twenty regions the TA has scheduled for band reconfiguration. This fact further illustrates the impracticality of basing the interim benchmark on the TA's schedule.

Following the *MO&O*, there is even stronger justification for flexible application of the Commission's eighteen-month benchmark. For the reasons described in Section I.D., *supra*, the expansion of ESMR relocation rights, including the reopening of an

⁴³ Letter from Gregory S. Ballentine, Association of Public-Safety Communications Officials-International, *et al.*, to Catherine W. Seidel, FCC, at 2 (Jan. 12, 2006); Memorandum of RCC Consultants, Inc. attached to Letter from Carl Robert Aron, RCC Consultants, Inc., to Catherine W. Seidel, FCC, at 62 (Dec. 21, 2005).

⁴⁴ "Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule Put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan," Public Notice, 20 FCC Rcd 5159, at Appendix (2005).

ESMR band election window, creates greater uncertainty and operational challenges as Sprint Nextel moves forward with 800 MHz band reconfiguration. In addition, with the new rules regarding ESMR relocation, the TA must take on additional decision-making responsibility and contend with increased administrative complexity. As one response to these developments, the Commission should clarify that Sprint Nextel, not the TA, has the discretion to select the twenty NPSPAC regions that will be subject to the interim benchmark for 800 MHz band reconfiguration.

IV. THE 800 MHz APPLICATION FREEZE SHOULD NOT ENCOMPASS MODIFICATION APPLICATIONS THAT EFFECTUATE RELOCATION AGREEMENTS AND THEREBY FACILITATE 800 MHz BAND RECONFIGURATION

In the *R&O* and in a subsequent Public Notice, the Commission established a freeze on certain applications during the band reconfiguration process.⁴⁵ During the two-stage freeze period (paralleling the Stage 1 and Stage 2 negotiation schedule in each NPSPAC region), the Commission will not accept applications for new facilities or modification applications requesting changes in the frequency of existing facilities or increases in coverage area. In taking this step, the Commission made clear that it would continue to accept applications “that are necessary to implement 800 MHz band reconfiguration.”⁴⁶ The Commission also stated that its freeze policy was designed to minimize adverse effects on incumbent 800 MHz licensees, and directed the TA to make the accommodations necessary to avoid such adverse effects.⁴⁷

⁴⁵ *R&O* ¶ 204; “Wireless Telecommunications Bureau Outlines Applications Freeze Process For Implementation of 800 MHz Band Reconfiguration,” Public Notice, 20 FCC Rcd 8905 (2005) (“*Freeze PN*”).

⁴⁶ *R&O* ¶ 204; *Freeze PN* at 2 n.10.

⁴⁷ *R&O* ¶ 204; *Freeze PN* at 2.

In the *MO&O*, the Commission again addressed its 800 MHz freeze policy. In particular, the Commission reiterated that “it will not accept modification applications that propose to expand the coverage area of an existing system,”⁴⁸ and stated that the freeze applies to “modification applications that seek to correct the operating parameters of existing stations . . . when to do so would expand the licensee’s currently authorized coverage contours.”⁴⁹ The Commission declared that “[i]n short, modification applications are limited to adding the new agreed-upon frequencies (i.e., frequencies consistent with the TA plan) or deleting the ‘old’ frequencies.”⁵⁰

Sprint Nextel is concerned that the *MO&O*’s statements regarding the application freeze could be interpreted in a way that frustrates the ongoing efforts to reach FRAs with incumbent 800 MHz licensees and the expeditious implementation of 800 MHz band reconfiguration. The restrictions articulated therein can deprive Sprint Nextel and incumbent 800 MHz licensees of the flexibility necessary to reach mutually acceptable relocation terms.⁵¹ For example, in some cases, the flexibility to make incumbent system modifications that marginally change the incumbent’s coverage area, or correct prior licensing inaccuracies, can facilitate the parties reaching a retuning agreement.

Sprint Nextel respectfully submits that the Commission should permit such modifications so long as they do not materially infringe on the additional spectrum availability for public safety intended to result from the Commission’s 800 MHz reconfiguration plan. Sprint Nextel notes that the flexibility to incorporate such

⁴⁸ *MO&O* ¶ 98.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The Commission has recognized the importance of flexibility for licensees in the relocation negotiation process. *Supplemental Order* ¶ 73. *See also R&O* ¶¶ 162, 202.

inducements in the relocation process for the Upper 200 channels at 800 MHz contributed significantly to the success of retuning negotiations in that band segment.⁵² Accordingly, the Commission should modify the restrictions articulated in its *MO&O* and direct the TA to permit certain license modifications associated with 800 MHz frequency reconfiguration agreements, provided they do not materially diminish public safety's spectral or operational expectancies.

V. THE COMMISSION SHOULD RECONSIDER THE NEED TO RECONFIGURE THE 800 MHz BAND IN AREAS THAT DO NOT HAVE ASSOCIATED NPSPAC REGIONS

In the *MO&O*, the Commission recommended that the TA include in Wave 4 the reconfiguration of the 800 MHz band in American Samoa, Guam, the Northern Mariana Islands, and the Gulf of Mexico. The Commission's recommendation, however, does not appear to take into account the full facts and circumstances regarding these territories. Reconfiguration may be both unnecessary and infeasible in these areas. For example, the Commission has never conducted an SMR auction for the Gulf of Mexico, and Sprint Nextel holds no spectrum rights there. There also appear to be few, if any, public safety licensees in the Gulf of Mexico. Under these circumstances, reconfiguration would be impractical given Sprint Nextel's lack of spectrum rights, and unnecessary given that no public safety interference problem exists in the Gulf of Mexico.

The Commission should consequently reconsider the need to reconfigure the 800 MHz band in these markets. It should direct the TA not to include these areas in Wave 4, and, to the extent it believes further action may be necessary, issue a public notice

⁵² *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463, ¶ 3 (1995).

seeking comment on the particular circumstances that would be raised in reconfiguring these markets.

VI. CONCLUSION

Sprint Nextel urges the Commission to reinstate the ESMR segment relocation criteria established in the *R&O* and *Supplemental Order*. The Commission should also issue the clarifications described above to promote an efficient, equitable band reconfiguration process.

Respectfully submitted,

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